Supreme Court of New Hampshire.

HORACE J. HALL v. HIRAM MARTIN ET AL.

At common law the heir was liable on the covenants of his ancestor in which he was specially bound, just so far, and no farther, as he had assets by descent; and as real estate alone descended to him, his liability was limited to that.

But when, by the statute of New Hampshire, the personal estate is made to descend to him, substantially in the same way, a correct application of the common-law principle requires it to be treated as assets in his hands, equally with the real estate; and it was therefore *held* that such heir is liable on the covenants of his ancestor, which could not have been proved while the estate was in the course of administration, to the extent of the *personal*, as well as the *real* estate, which has so descended to him.

Suits against an heir or devisee are not barred by the provisions of the Revised Statutes, ch. 161, §§ 5 and 6, limiting actions against executors or administrators of solvent estates, where no funds are retained for contingent claims by order of the judge of probate, to three years from the original grant of administration.

But the limitation applies only to suits against the executor or administrator, and therefore the remedy against the heir or devisee upon claims which could not be proved during the three years, because contingent, is not impaired by these provisions, but remains as in the case of insolvent estates.

THIS was an action for covenant broken on the covenants of a deed made by Moses Martin, the father of the defendants, to the plaintiff, in which deed he covenanted for himself and his heirs.

In the declaration it was alleged that the defendants "received personal assets as heirs of their said father, sufficient to perform all the covenants of the aforesaid deed." The defendants demurred to the declaration and claimed judgment, for the reason that it did not appear by the declaration that they received land or real estate by descent.

Ladd, for plaintiff.

Haywood, for defendants.

The opinion of the court was delivered by

BELLOWS, J.—At common law, lands in the hands of the debtor himself, were not assets for the payment of debts, and creditors could only reach the personal estate, and the profits of the real estate; but not the land itself.

Upon the death of the debtor, in case of intestacy, the land descended to the heir, and the personal estate to the executor; and in respect to simple contract debts, the creditor could look only to the personal estate, in the hands of the executor; while

the creditor by specialty, in which the heir was named, could reach the land itself in such heir's hands; but the heir was bound no farther than he had assets by descent, and nothing was regarded as assets but real estate, for nothing else descended to him.

By will, however, the debtor might charge his lands with the payment of his debts, or any part of them, and, therefore, when, by his covenant or bond, he expressly undertook to bind his heir by a necessary implication, it was held to be a charge upon him to the extent of the lands so descended to him; otherwise such covenant or stipulation would have been wholly inoperative.

By our law, both real and personal estate are made liable for the payment of debts, both before and after the death of the debtor; although, in the hands of the administrator, the personal estate is primarily liable.

So, too, the personal estate, equally with the real estate, goes to, or descends to the heir, after the debts are paid, and we think it is clearly the general policy of our law, that both descriptions of property shall be assets for the payment of debts before and after the death of the debtor; whether in the hands of the administrator or heir.

The question, then, is, whether the liability of the heir is limited to the real estate which descends to him, by any authority that ought to be regarded as decisive, in view of the changes of the common law made by our legislation.

In the case of *Hutchinson* v. *Stiles*, 3 N. H. 404, the common-law liability of the heir was held to be suspended so long as the remedy against the administrator existed, upon the ground that by our laws, no assets passed to the heir, until the remedy against the executor or administrator ceased to exist; and, that to hold the heir liable when he had received no assets and might never receive any, would be unreasonable and unjust. This conclusion was reached, not because of any provision expressly suspending the heir's liability, but because the ground upon which that liability rested at common law, namely, that he had assets by descent, was for a time removed.

When, therefore, by the provisions of our statutes, the common law is so far changed that the personal property of the deceased debtor descends to the heir in the same manner as real estate, it would be but a proper application of the principle of *Hutchinson* v. *Stiles*, to hold the heir liable to the extent of whatever descends

to him from his ancestor, which, by the policy of our law, may justly be regarded as assets for the payment of the debts of the deceased. The personal estate is, by our law, primarily charged with such debts, and it is wholly inconsistent with its policy to hold that on distributing that estate among the heirs, after paying such claims as could be proved within the time limited for that purpose, it should cease to be chargeable at all.

At common law the personal estate continued liable in the hands of the executor or administrator, until all the claims were paid; and it would be a wide departure from the policy of *that* law to provide for a distribution of such estate among the heirs, free from all charge for debts not provable during the administration, but becoming so afterward.

In the case of *Ticknor* v. *Harris*, 14 N. H. 272, which was a suit against devisees and legatees upon a covenant of the testator, our legislation upon this subject was examined, and it seems to have been understood that the personal estate could be reached only through the executor or administrator; PARKER, C. J., saying that "no way seems to be provided for a creditor to reach a distributive share of the personal estate in the hands of the heirs, where the suit against the administrator is taken away."

It will be seen, however, that this point did not arise, necessarily, in that case: nor does the language used indicate a full consideration of it; or that it was intended as an authoritative decision of that question. It was there held that the remedy against devisees existed under our statutes, but that the proviso saving the remedy against heirs and devisees did not reach *legatees;* upon the ground that this saving clause created no new right, and, therefore, as no action against the legatees could be maintained before that statute, none can be since.

We are inclined, therefore, although with the highest respect for the suggestion of Judge PARKER, to consider this as still an open question in this state.

When the law provided for distributing among the heirs the surplus of the personal estate remaining after paying such claims as could be proved during the time, and in the methods pointed out; and when it must have been obvious to every one that large claims might afterwards accrue which could not before have been proved; we think it a sound construction of these statutes to

hold that, by a fair implication, the personal estate, which is made thus to descend to the heir, must be regarded as assets for the payment of such claims. It is true these statutes do not expressly in terms make the personal estate assets in the hands of the heir; nor do they expressly suspend all remedy against the heir while the real estate is in the hands of the administrator; and yet by implication it is suspended, and rightfully too.

The principle of the common law clearly was that the heir should be liable for specialty debts in which he was bound, *just to the extent of the assets* which descended to him from the debtor, and no farther.

Any provisions of our statutes which have the effect to increase or diminish what must substantially be regarded as assets, must, upon the principle on which the common law rests, cause a corresponding increase or diminution of the heir's liability, and this was the doctrine of *Hutchinson* v. *Stiles.*

So, also, whatever descended to the heir from the debtor, by the common law, was assets; and, therefore, when by our law personal estate is made to descend to him, it must be regarded as assets also.

The case of *Ticknor* v. *Harris* decides that a suit cannot be maintained against a legatee for the debt of the testator; but this decision does not bear upon the question before us. At common law the legatee was not bound; there was no attempt, by the testator, to bind him, and no change has been made, by our statutes, that affect his relation to the creditors. In this respect the legatee differs widely from the heir.

It may also be remarked that, in England, the liability of the heir has been extended beyond what are strictly assets at common law; as in the case of an equity of redemption in lands, *Solley* v. *Gower*, 2 Vernon 61, where it was held that, although such equity is not assets at law, because the estate is forfeited; yet the heir having a right in equity, *that* ought in equity to be liable to satisfy a bond debt; and if the heir has sold or released his equity of redemption to prevent the creditors obtaining satisfaction of their debts, the court will follow the money into the hands of the heir or his executor. Here then is a case where the heir is held liable for what at law is not assets, but which in justice and equity ought to be applied to the payment of debts.

By the policy of our laws an equity of redemption is made legal

assets, and there would seem to be no reason to doubt that it might be reached in the hands of the heir by a suit at law.

The term assets does not denote any particular species of property, but is said to come from the French word *assez*, which means sufficient or enough; that is, enough means in the hands of the heir to pay the debt; and we think that to refuse to include among such property that which by our legislation is made to descend to the heir, in addition to that which went to him at common law, would be an adherence to the letter rather than to the spirit of the old law, and especially when, by the old law, the personal estate in the hands of the executor would continue liable.

In the case of the creditors of Sir Charles Cox, 3 P. Wms. 341, it was held that where a term of years was mortgaged, the equity of redemption in the hands of the heir was equitable assets, and as such should go to the simple contract creditors equally with the specialty creditors.

This rule of equity as to the distribution of assets among all classes of creditors is adopted in New Hampshire, and also in New York and New Jersey and many other states; and even in England by the Statute of 3 and 4 Wm. 4, c. 104, passed in August 1833, lands, of which a debtor dies seised, are made liable for his debts of all classes, although a preference is there given to debts by specialty.

The policy of our law is to make no distinction; and also to charge all kinds of property with the payment of the debts in the hands of the executor for a limited time, and after that to be distributed among the heirs, but still remaining liable for debts not barred by express limitations, and which could not before be proved.

It has been suggested that in respect to solvent estates, at least, claims of this sort are barred by the operation of sections 5 and 6 of ch. 161, Rev. St., which provide that no action shall be commenced against an administrator after three years from the original grant of administration, unless assets are retained by him by order of the judge of probate; which may be done to pay demands not due, or depending on a contingency; and which are filed in the Probate Court, unless the distributees give bonds to pay such claims.

If this provision applied equally to estates settled in the insolvent course, there would be more force in the suggestion, but

such is not the fact; on the contrary, by sections 13 and 15 of ch. 163, Rev. St., it is provided that claims that might be presented to the commissioners of insolvency, and allowed, and were not, shall be for ever barred; but that the remedy against the heir or devisee upon any claim which could not be allowed because it depended upon a contingency, should not be barred by any neglect to make such presentation.

When, therefore, we bear in mind that all estates may be settled in the insolvent course, whether actually insolvent or not, this provision, saving the remedies against the heir and devisee, must be regarded as strongly indicative of the policy of the law in reference to all estates, whether settled in the insolvent course or not.

The difference between the two modes is merely formal, and cannot affect the substantial justice of preserving the charge upon the assets, after coming to the distributees, for all claims that could not before be presented and allowed. In both modes the assets, both real and personal, are in the hands of the administrator, to be distributed among such creditors as can prove their claims, in the methods pointed out; and after that the surplus is passed to the heirs, devisees, and legatees; and no further suits or proceedings can be maintained against the administrator.

Under such circumstances, it is difficult to perceive any reason for saving the remedies against the heir and devisee in the case of insolvent estates, which does not apply with equal if not greater force to solvent estates.

In respect to the latter, the limitation is of suits against the administrator merely; and nothing is said of suits against the heir or devisee; and, therefore, as at common law, and the statute of 3 and 4 William and Mary, the remedy against the heir existed before our statutes upon this subject, the additions provided by our statutes to the remedy against the administrator must be regarded as cumulative unless the contrary appear, either expressly or by necessary implication: *State* v. *Wilson*, 43 N. H. 418; *Rex* v. *Robinson*, 2 Burr. 799; *Bowen* v. *Lease*, 5 Hill 226.

It is true that in the case of solvent estates there is no provision expressly saving the remedy against the heir and devisee, as there is in respect to insolvent estates; but it will be observed that in the latter case there is a provision which expressly bars all claims which might have been presented to the commissioners,

but were not; and the saving of the remedy against the heir and devisee, is in the nature of a proviso; while, in respect to solvent estates, the provision is merely that no suit against the administrator shall be maintained.

Indeed, it may well deserve consideration, whether the saving of the remedy against heirs and devisees by sect. 13, ch. 163 of the Revised Statutes, may not apply to solvent as well as insolvent estates—the reason for it is obviously the same, and the language of the provision is broad enough to include both; although by reason of its reference to the presentation of claims to the commissioners, there may be some ground for an inference that insolvent estates were alone referred to. But however this may be, we think it furnishes a strong argument against a construction of sect. 5 and 6 of ch. 161 of the Revised Statutes, that should take away all remedy against heirs and devisees.

Again it is very clearly the policy of our statutes to give to all a reasonable opportunity to prove their claims, and to share in the distribution of the assets; and with that view the assets are all placed in the hands of the executor or administrator and opportunity given, during a limited time, to make proof of claims and receive payment; and, therefore, the assets remaining are distributed among the heirs and devisees and others entitled to them; saving to such creditors as could not prove their demands during the time limited, for the reason that they were wholly uncertain and contingent, their remedies against the heirs and devisees.

Such are the general features and policy of our laws upon this subject, and to justify a construction of any special provision that would cut off all remedy upon a contract of indemnity or a covenant in a deed of land, would require a pretty clear expression of legislative intention, more so than any we find in the provisions in question.

The cases are numerous where it would be practically impossible to make proof of claims while estates were in the course of administration. Among these are covenants of warranty of title to land where the breach has arisen long after the covenantee had himself conveyed with warranty; contracts of indemnity where the breach and the damages are both wholly uncertain; official bonds of sheriffs and their deputies involving complicated questions of suretyship and otherwise; individual liabilities of corpo-

rators involving great difficulties in adjusting the claims against each; and a great variety of other cases of a similar nature, equally meritorious with those claims which were in a situation to be proved while the estates were in the course of administration. And it would clearly be not only unjust, but contrary to the policy both of the common law and our own statutes, that these claims should be unpaid while there were sufficient means left by the debtor to discharge them.

If it were to be conceded that the legislature possessed the constitutional right to bar claims that could not be presented and proved during the time limited, it would, nevertheless, be so repugnant to all notions of justice as to forbid such a construction unless the intention was very clearly expressed.

If the demands had not accrued until the expiration of the limited time, a law which should cut off the remedy would in its effect be the same as the destruction of the right, and such an intention is not to be presumed. The cases of *Cutter* v. *Emery, Adm.*, 37 N. H. 567, and *Walker* v. *Cheever et al.*, 39 Id. 420, have been referred to, but it will be perceived that they are both suits against administrators which were barred by the express terms of the statute; but no question was raised as to the effect upon suits against the heir and devisee, and therefore they are not in point.

Upon these views, then, we are brought to the conclusion that in respect to creditors who could not prove their claims, while the assets were in the hands of the administrator or come into distribution for them, their remedies against the heirs and devisees are not barred by any provisions respecting either solvent or insolvent estates.

In the case before us, it is to be assumed that the cause of action did not accrue to the plaintiff until it was too late to reach the assets in the hands of the administrator; and the claim is one sounding in damages and wholly unliquidated and uncertain. Under such circumstances it would be palpably unjust that the heir should take the estate, all of which might be personal, free of the plaintiff's claim. Nor do we think such a result would be in accordance with the policy disclosed by our legislation.

With these views, there must be judgment for the plaintiff upon the demurrer.

PERRY, C. J., and BARTLETT, J., gave a dissenting opinion.